In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1190

MILTON BERGER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 42a–55a; Pet. App. 16–27) [1] is officially reported at 48 T.C. 848. The opinion of the court of appeals (Pet. App. 1–13) is officially reported at 404 F. 2d 668.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1968 (Pet. App. 15). A petition for rehearing (Pet. App. 28–39) was denied on December 26, 1968 (Pet. App. 40–41). On December 27, 1968, the court of appeals entered an order modifying its

[1] "R" refers to the appendix to petitioners' brief in the court of appeals.

347-947—69

opinion of November 29, 1968 (Pet. App. 14). The petition for a writ of certiorari was filed on March 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether deficiency notices the Commissioner of Internal Revenue mailed to petitioners sufficed to start the running of the 90-day period for the filing of petitions for redetermination in the Tax Court, where the Commissioner sent the notices to petitioners at their respective homes by certified mail, with carbons to their attorney by regular mail.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 6212. NOTICE OF DEFICIENCY.
>
> (a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, 1665–1666] *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.
>
> (b) [as amended by Sec. 76, Technical Amendments Act of 1958, *supra,* p. 1661] *Address for Notice of Deficiency.*—
>
> (1) *Income and gift taxes.*—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle

A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

[26 U.S.C. 6212.]

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days * * * after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day[s] * * * nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * *

* * * * *

(c) *Failure to File Petition.*—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

* * * * *

[26 U.S.C. 6213.]

STATEMENT

For the tax years at issue, 1960 through 1962, the Commissioner and petitioners disputed the proper tax treatment of payments petitioner Pennsylvania Papyrus made to the individual petitioners. On April 30, 1965, the District Director of Internal Revenue, Newark, New Jersey, mailed 30-day letters[2] to each petitioner at the address as shown on the respective tax return, in each case his home address. (R. 5a, 44a.) On May 19, 1965, photostatic copies of a power of attorney (an Internal Revenue Service Form 2848) were filed on behalf of each petitioner. Petitioners' addresses, as shown on the powers, were identical to those given on the tax returns and 30-day letters, but on each form, the words "[c]opies of" were deleted by hand from the printed statement "Copies of correspondence addressed to the taxpayer in proceedings involving the above matter(s) should be sent to:" and immediately thereafter the name and address of Jules I. Whitman, Esquire, was inserted by typewriter. (R. 5a–6a, 44a–45a.)[3] Petitioners next filed protests which stated their addresses as those used in the 30-day letter (R. 6a–7a, 46a). On September 24, 1965, the District Director mailed to those addresses letters inviting a conference at the appellate section of the Internal Revenue Service (R. 26a–28a). Several consents to extension of the period of limi-

[2] A taxpayer who contests the Internal Revenue Service's preliminary determination of his tax liability receives a "30-day letter" allowing him 30 days to request a district conference or to file a protest seeking an appellate division hearing.

[3] Reproduced copies of the powers, showing the method of alteration, appear at R. 12a–14a, 70a, 78a, 86a.

tations were filed in each case stating the same addresses as the above-described communication. (R. 8a–9a, 47a–48a.)

On June 3, 1966, the Commissioner sent, by certified mail, notices of deficiency to petitioners at these addresses.[4] The statutory notices of deficiency were received by petitioners shortly after mailing, in ample time to file, had they so elected, a timely petition for redetermination. (R. 9a–10a, 48a–49a.) Also on June 3, 1966, the Commissioner sent, by ordinary mail, a carbon copy of each notice of deficiency to Whitman, who received them in the ordinary course of the mails (R. 9a–10a, 48a–49a).

Petitioners mailed petitions for redetermination in the Tax Court on September 9, 1966, 98 days after the mailing of the notices of deficiency (R. 49a–50a). The Commissioner moved to dismiss on the ground that the petition had not been filed within the 90-day period required by statute. Petitioners also moved to dismiss, claiming that the deficiency notices had not been validly issued. The Tax Court (R. 50a–55a) granted the Commissioner's motion, and denied that of petitioners, finding (R. 50a–55a) that inasmuch as petitioners were in no way misled or prejudiced by the form of the notices and admittedly received them in sufficient time to file a timely petition, the notices of deficiency were validly issued.

[4] Petitioner Berger moved before the notice of deficiency was mailed, but after filing the returns at issue. Although he had not informed the Service of his move, Berger received the notice in ample time to file a timely petition for a redetermination. (R. 48a–49a.)

ARGUMENT

Under Section 6212(b)(1) of the Internal Revenue Code of 1954, a deficiency notice is sufficient if "mailed to the taxpayer at his last known address". It has long been the rule that the Commissioner's determination of the taxpayer's last known address will be sustained if, based on all the facts known to him at the time of mailing, he could reasonably determine that the taxpayer wished to be reached at the address to which the notice was sent. *Gregory* v. *United States,* 57 F. Supp. 962, 973–974 (Ct. Cl.), certiorari denied, 326 U.S. 747; *Clark's Estate* v. *Commissioner,* 173 F. 2d 13 (C.A. 2). The taxpayer's last known address is a question of fact to be decided by the trier of fact on the basis of the entire record. *Expanding Envelope and Folder Corp.* v. *Shotz,* 385 F. 2d 402 (C.A. 3); *Delman* v. *Commissioner,* 384 F. 2d 929 (C.A. 3), certiorari denied, 390 U.S. 952; *DeWelles* v. *United States,* 378 F. 2d 37 (C.A. 9), certiorari denied, 389 U.S. 996; *Williams* v. *United States,* 264 F. 2d 227 (C.A. 6); *D'Andrea* v. *Commissioner,* 263 F. 2d 904 (C.A.D.C.). None of these cases—or any other cited by petitioners—creates an immutable rule of law that a direction given on a slightly modified power of attorney form necessarily creates a new last known address which must be followed in all instances regardless of other record evidence.[5] It is clear from the evidence below

[5] Because the Commissioner also sent a copy of each notice to Whitman by ordinary mail (R. 9a–10a, 48a–49a), the present case could be viewed as involving the use of ordinary mail instead of certified mail in sending notices to the proper address rather

(R. 50a–55a; Pet. App. 5–8) that the Tax Court's determination that the mailings at issue were to petitioners' last known addresses is supported by substantial evidence, is not clearly erroneous and was therefore properly affirmed by the court of appeals.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
CROMBIE J. D. GARRETT,
STEPHEN H. HUTZELMAN,
Attorneys.

APRIL 1969.

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than mailing by certified mail to an improper address. Notice sent by ordinary mail is sufficient when, as here, it was admittedly received. *Boren* v. *Riddell*, 241 F. 2d 670 (C.A. 9).

[6] In addition to the factual determination upon which the decision of the Tax Court was sustained, the court of appeals also indicated, as additional reasons for affirming the Tax Court's decision, that Section 6212(b)(1) allows, but does not require, that a notice be sent to taxpayer's last known address (Pet. App. 9–11); and that even if the notices were not mailed to the last known address, and if this were required by Section 6212, the instant mailings were not so deficient as to bar the Tax Court's jurisdiction (Pet. App. 11–12). Had the result below rested solely on these two postulates, petitioners' assertion (Pet. 8–10) of a conflict with the holding of other circuits might well have been meaningful. However, resolution of these alternative questions would not affect the result of petitioners' case, and is therefore not appropriate here. See *Delman* v. *Commissioner*, 384 F. 2d 929 (C.A. 3), certiorari denied, 390 U.S. 952.

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